		FILED LODGED
Ternando Segoviano Almanza Name and Prisoner/Booking Number		0-1 15 2015
Ariz Dept. of Corrections - SMUI		Oct 15 2015
Place of Confinement	***************************************	CLERK U.S. DISTRICT COURT
P.O. Box 4000 Mailing Address		DISTRICT OF ARIZONA
Florence, Az 85132 City, State, Zip Codo		
(Failure to notify the Court of your change of address may	result in dismissal of this action.)	
	TATES DISTRICT COU TRICT OF ARIZONA	RT
FERNANDOSEGOVIANO ALMANZA	.	
(Full Name of Petitioner)	→ /	
Petitioner,)	
)	
VS.) CASE NO	nlied by the Clark)
Charles L Ryan) (10 be sup	plied by the Clerk)
(Name of the Director of the Department of	-	
Corrections, Jailor or authorized person having)	
istody of Petitioner)		DER 28 U.S.C. § 2254
Respondent,		DF HABEAS CORPUS IN STATE CUSTODY
and		ATH PENALTY)
The Attorney General of the State of Arizowa)	
)	
Additional Respondent.	.)	
	 /	
P	ETITION	
		0.5.1
1. (a) Name and location of court that entered the		
Florevice, Az. 85/32	ason Lopez Circle	KINGT
11030000 1522 8213		
(b) Criminal docket or case number:	2011-03026	
2. Date of judgment of conviction:	ren 7 th , 2013	
3. In this case, were you convicted on more than	one count or crime?	Yes No No
		EAA
		530

	Court 1: Sexual Conduct with a minor, under theage of 12 years
	Length of sentence for each count or crime for which you were convicted in this case:
•	Life imprisonment
	(a) What was your plea?
	Not guilty
	Guilty Nolo contendere (no contest)
	1000 contendere (no contest)
	(b) If you entered a guilty plea to one count or charge, and a not guilty plea to another count or charge,
	give details:
,	
	/ \ YC
	(c) If you went to trial, what kind of trial did you have? (Check one) Jury \(\mathbb{Q}\) Judge only □
	(c) If you went to trial, what kind of trial did you have? (Check one) Jury \(\overline{\Omega}\) Judge only □ Did you testify at the trial? Yes □ No □
	Did you testify at the trial? Yes □ No □
	Did you testify at the trial? Yes □ No □ Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes ☒ No □
	Did you testify at the trial? Yes \(\square\) No \(\square\) Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction?
	Did you testify at the trial? Yes □ No □ Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes ☒ No □ If yes, answer the following:
	Did you testify at the trial? Yes □ No □ Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes ☒ No □ If yes, answer the following:
	Did you testify at the trial? Yes \(\sigma\) No \(\sigma\) Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes \(\sigma\) No \(\sigma\) If yes, answer the following: (a) Date you filed: \(\sigma\) \(\sigma\) \(\sigma\) \(\frac{1}{3}\) \(\frac{1}{3}\) \(\frac{1}{3}\) \(\frac{1}{3}\) \(\frac{1}{3}\) \(\frac{1}{3}\) \(\frac{1}{3}\) \(\frac{1}{3}\)
	Did you testify at the trial? Yes \(\simeq \) No \(\simeq \) Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes \(\simeq \) No \(\simeq \) If yes, answer the following: (a) Date you filed: \(\sum_{\text{CA}} \sum_{CA
	Did you testify at the trial? Yes \(\simeq \) No \(\simeq \) Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes \(\simeq \) No \(\simeq \) If yes, answer the following: (a) Date you filed: \(\sum_{\text{CA}} \sum_{CA
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	Did you testify at the trial? Yes \(\simeq \) No \(\simeq \) Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes \(\simeq \) No \(\simeq \) If yes, answer the following: (a) Date you filed: \(\sum_{\text{CA}} \sum_{CA
	Did you testify at the trial? Yes \(\sim \) No \(\sim \) Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes \(\sim \) No \(\sim \) If yes, answer the following: (a) Date you filed: \(\sum_{\text{COUNCE Figor}} \) \(\sim_{\text{CONNCE Figor}
	Did you testify at the trial? Yes \(\) No \(\) Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes \(\) No \(\) If yes, answer the following: (a) Date you filed: \(May \) 1 \(\frac{5}{7} \) \(\) 2014 (b) Docket or case number: \(\) \(\) 2CA \(\) CR \(\) 2014 \(\) OO \(\) 4 (c) Result: \(\) \(\) Conviction \(Affirmed \) (d) Date of result: \(\) \(\) August \(\) \(\) \(\) 2014 (e) Grounds raised: \(\) \(\) Did the Court Err in determining Appellant's statements were
	Did you testify at the trial? Yes \(\text{No} \) Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes \(\text{No} \) If yes, answer the following: (a) Date you filed: \(\text{May} \) 1 \(\frac{5^4}{2014} \) (b) Docket or case number: \(\text{2CA-CR 2014-0034} \) (c) Result: \(\text{Conviction} \) Affirmed (d) Date of result: \(\text{August 29, 2014} \) (e) Grounds raised: \(DDid the Court Err in cletermining Appellant's Statement's were voluntary 2) Was it funds mental Error to admit to Rule 40400 Prair had
	Did you testify at the trial? Yes \(\text{No} \) Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes \(\text{No} \) If yes, answer the following: (a) Date you filed: \(\text{May} \) 15\(\text{2014} \) (b) Docket or case number: \(\text{2CA-CR 2014-0034} \) (c) Result: \(\text{Conviction} \) Affirmed (d) Date of result: \(\text{August 29, 2014} \) (e) Grounds raised: \(Did the Court Err in determining Appellant's Statement's were voluntary 2) Was it fundamental Error to admit to Court a directed werely of extra court and directed werely o
	Did you testify at the trial? Yes \(\text{No} \) Did you file a direct appeal to the Arizona Court of Appeals from the judgment of conviction? Yes \(\text{No} \) If yes, answer the following: (a) Date you filed: \(\text{May} \) 1 \(\frac{5^4}{2014} \) (b) Docket or case number: \(\text{2CA-CR 2014-0034} \) (c) Result: \(\text{Conviction} \) Affirmed (d) Date of result: \(\text{August 29, 2014} \) (e) Grounds raised: \(DDid the Court Err in cletermining Appellant's Statement's were voluntary 2) Was it funds mental Error to admit to Rule 40400 Prair had

If yes, answer the following	g:							
(a) Date you filed:					·			· ·
(b) Docket or case number	r:							
(c) Result:					· · · · · · · · · · · · · · · · · · ·			• , •
(d) Date of result:			,	· ·		·		· · ·
(e) Grounds raised:								
				·····				
Attach, if available, a copy of an	ıy brief filed on	your behal	f and a copy o	f the decisio	n by the co	ourt.		
Did you file a petition for	certiorari in	the United	l States Supr	reme Cou	rt? Yes	□ No	X	
If yes, answer the followin	g:							•
(a) Date you filed:								
(b) Docket or case number	r:	-			· · ·	-		
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(c) Result:			. · · · · · · · · · · · · · · · · · · ·		-	<u></u>		
(c) Result:								
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(c) Result:								
(c) Result:								

a) First Petition.
(1) Date you filed: November 25th, 2013
(2) Name of court: Piney County Superior Court
(3) Nature of the proceeding (Rule 32, special action or habeas corpus): New trial - Rule 5 of Frocedure CR-201 03026
(5) Result: irrelevant - The statute, the rule is inappropriate - denie
(6) Date of result: February 14th, 2014
(7) Grounds raised: request for New trial - filed by assistance of fellow immake up grounds raised as far as can be determined other than immake was unawayes of his current status and complete confusion of his predicament. Motion is unavailable at this time.
Attach, if available, a copy of any brief filed on your behalf and a copy of the decision by the court.
b) Second Petition.
(1) Date you filed: March 19th, 2015
(2) Name of court: Piñal County Superior Court
(3) Nature of the proceeding (Rule 32, special action or habeas corpus): Rule 32
(4) Docket or case number: <u>CR 2011 03026</u>
(5) Result: Appointment of Course) Richard Luff
(6) Date of result: <u>April</u> 06 ^m , 2015
(7) Grounds raised: Nove as of this writing. To Mr Almanzas ide tendant, Appellants Knowledge Mr. Wiff has yet to make Contact nor file any brief. Appellant has notified the court of this error and is currently requesting New Courses with leave to extend time to file Rule 32 when even appointment is order Motion attached Exhibit III
Attach if available a convert any brief filed on your hebalf and a convert the decision by the court.

The second secon	 			
(2) Name of court:				
(3) Nature of the pro	oceeding (R	ule 32, special action	or habeas corpus): _	
(4) Docket or case r	number:			
(5) Result:				
(6) Date of result: _				
(7) Grounds raised:				
	action taken	on your petition, an	olication, or motion to	the:
Did you appeal the		ourt of Appeals:		preme Court:
Did you appeal the (1) First petition:	Arizona C			
	Arizona Co	ourt of Appeals:	<u>Arizona S</u>	no 💢
	Arizona Co Yes 🐧 : Yes □	ourt of Appeals: No □	<u>Arizona S</u> i Yes □	No IX

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the <u>facts</u> supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

					
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· 					
a) Supporting FACTS (De	not argue or cite	e law. Just stat	e the specific	facts that support	t your claim.)
Defendant Re Ill					
immorent with men	al deticienc	ie i as a He	sted by his	trial afterno	ey and
subsequent mental e	valuation and	this interro	refers exp	gnence IN spe	eaking wit
de Gendant. Mr Alman	is in no man	world have	understood	his Morand	<u>a rights</u>
without repented an	& properly tra	urlated mount	ings and r	jahts avantall	e to tomic
Country. Mr. Almans	was in bolice	custody at	the times	r interrogation	w, the Str
interpreter was una	Whited Wie I	lirender Ma	nts were a	new Mocchia	tely and
Tamas parish	nade involunto	ANCH LAKE CX	Mari T ob	NINE DILET J.	(1,0)
to properly wheren	t an intervent	buing. On a mile	the ship to	translate al	Natra (1 Lock
meaning clearly and	Contrate all o	ware with	What T Co	ctute co	WY IS
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askel "CO. Soyou u	uderstand you	r right and	l vin war	t to answe	n avestin
The interrogation !	ou all mahts	should have	ended th	ere. It was	not
The officers ev	W MONT JOIL	24 124 3 (A)	145 1// 1/2	21 11 11 11 11 11 11 11 11 11 11 11 11 1	<u>, , , , , , , , , , , , , , , , , , , </u>
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Can't afford one (a	toway), then	the Court	can appor	of one at a-	ata.
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	und Two: Was it Fundamental error to admit to Rule 404 (b)
(a)	Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim.);
	The State did not provide notice of prior balacts, as required by Rule 15.1. The sta
ĽŒ.	led to adjuse the Court of likely use of prior badacts to order to obtain a relying on
لۍ)	wany of the mor had act them was are prolicial wrighing of the probative value
0,	the prior bal acts. There was no limiting justicultiums.
	There was no similarly between the molestation of a 4 yrold to "groping" an adult.
	Thre was no evidence that Mr. Almonza "sexually harassed" the mother (Ms. O.).
<u> </u>	The mother never reported any alleged microndust to any co-worker on employer
\mathcal{L}	tanty com "groping, peeping, wrongful entry in home or butting up against an ad
	their was no DNA. The justim reported an weertim of a frager with sharp woil
Sø	me entence was to be left behind.
	A shorp would have gut a yun olds private area beyond a nive abrasions
	nether old reported being hit by a shorel-or the "back"! No enrichmen was
e	even discovered of any such impact.
	DE Klein agreed the small abrasions could have been caused by something els
1	nis abrasion was an external, not vaginal, abrasion. As a long shorp would be
2	The word that Mr. Almanza stated was he lifted the for ald by the sport of her
~~	The worst that Mr. Almanza stated was he litted the lyrold by the seat of her into As customany with you olds, No sexual act was ever intended at worst it
1. 141	is an invitentimal inadverdent contact. Not illegal and certainly not chargeals
6	ourictable and dooned to goed his like in prison. No composition was ever establish
1	is warrant connecting - the court and appeal court exceed in not dismissing the charge.
(b) Did you present the issue raised in Ground Two to the Arizona Court of Appeals? Yes 💆 No 🗆
(c) If yes, did you present the issue in a:
•	Direct appeal ✓S First petition □
٠.	Second petition
	Third petition
(d) If you did not present the issue in Ground Two to the Arizona Court of Appeals, explain why:
_	
_	

Almonas's tries and indictment. Me Props offer realization & cold use Midlimonas we's by 3 take and Solunteered "to testify to exchange for a sweetheast deals. Mr. Beggs was so interested to "halpton" Mr. Almonas and wanting to get at a girl of the solution of the 23 of 2012 (See Exhib T.) Bongs was a g.p. (General population Jurimate, no sexual changes were evidently for the two sheld over have been in the same location. It is no secret that a g.p. immate with an whatever to purpose form on so immate. This works killing of So immates. This who purposed form on so immates. This works killing of So immates. This works seemed with the purposed form of so immates. This works killing of So immates. This works seemed with a separate are formated and laying to court. The bours was setting a more township plan agreement. Bongs may have well killed Mr. Almonas of the State when Burgs Contacted the detections. Bongs we left in the area of Mr. Almonas. Our true 12 2012 in a Mature for Disclosive, alterna things we specifically requested the planes and recommend to prove the afternation so assertion of a watery for determine facts not in Evidence to prove the about an exclusion plane raised in Ground Three to the Arizona Court of Appeals? Yes M. No. (c) If yes, did you present the issue raised in Ground Three to the Arizona Court of Appeals? Yes M. No. Third petition	VALUE INVALLE	were olicited	PA & CAVA	GLVINO VIEW	TI VIDIA	atter in	dictment	while in
a) Supporting FACTS (Do not argue or cite law. Just state the specific facts that support your claim. Rouges a fail homete (prestral) began a relationship with Me Almonta. Bog a correct Criminal gained Madliments four flower realizing to could be Mr Almonta with be the State and indictionant. The bongs effect realizing to could be Mr Almonta with be the State and "Almonta with to test the fact the first of the Sweetheast Agal. Mr hours was so interested in "halptor" Mr Almonta and wanting to get not at pail ASAP. That Mr Congs wrote and helped Pile a Motion for Fast and Speed trad on Feb 23 of 2012 (See Exhald TV). Rongs was a gop (General pepulation) wimate, we sexual Changes were eviled the Mr Almonta was a S.D. Gex affected wimate. The two should never the particle of the first of	ustadu?sl	ould the state	ment of f	Bonas h	are been	SUDDICSE	Q ?	
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(B) the date on which the impediment to filing	an application created by State action in
violation of the Constitution or laws of the Unite	d States is removed, if the applicant was
prevented from filing by such State action;	
(C) the date on which the constitutional right assert	ed was initially recognized by the Supreme
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Exhibit I opening brief-Appellant 2CA-CR 2014-0034 Pinal Co. CR 2011-03026

COURT OF APPEALS

DIVISION TWO

STATE OF ARIZONA

STATE OF ARIZONA,

Plaintiff-Appellee,

٧.

FERNANDO ALMANZA,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF THE PINAL COUNTY SUPERIOR COURT HONORABLE BOYD T. JOHNSON Pinal County Superior Court Judge

OPENING BRIEF

Lynn T. Hamilton, #004047 240 N. Center St. Mesa, AZ 85201 (480) 545-5511 Lynn.Hamilton@azbar.org

Statement of Case

¶1 The pertinent facts relating to the progress of the case include:

DATE EVENTS

10/22/11 Date of event of alleged child molestation

10/23/11 Arrest and interrogation

Indictment

Client interviewed at police headquarters

09/30/13 -

10/07/13 Trial

01/10/14 Appellant was sentenced to life without release or no less than 35 years with 771 days back-time credit

01/14/14 Notice of Appeal

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<u>U.S. v Vo</u>, 413 F.3rd 1010 (9th Cir. 2005)

<u>U.S. v Wade</u>, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)

Statement of Facts

- Ada, the four-year-old, related she lived with her mom and brother Jack at a pig ranch (R.T. 10-2-13 at 106). Fernando was a ranch hand who sometimes helped Ada and Jack feed the pigs. On October 22, 2011, Ada was feeding the pigs and she sat on Fernando's lap. She recalled he pulled her dress up and put his finger in her private parts (R.T. 10-2-13 at 104-108).
- ¶3 Ada went to her mom who was butchering a pig and said "Fernando has really sharp nails" (R.T. 10-2-13 at 147). Ada pointed and said he touched me down there. Mother, Katie, called the police.
- ¶4 Later, Mother, Ada and police went for a medical exam at Tucson Medical Center (ld at 150).
- Nurse Hess and Dr. Klein testified that at the forensic evaluation, Ada had an abrasion .37 cm on the posterior labia (R.T. 10-7-13 at 27). The child had a little blood on her underwear (ld at 41).

1.

DID THE COURT ERR IN DETERMINING THE ACCUSED'S STATEMENTS WHILE IN CUSTODY WERE FREE AND VOLUNTARY? DID THE COURT ERR IN ADMITTING THOSE STATEMENTS?

Standard of Review

The trial court's findings of fact are reviewed for abuse of discretion.

The legal question of whether evidence was obtained in violation of the Constitution is reviewed *de novo*. St. v Davolt, 207 Ariz. 191, 84 P.3rd 456 (2004).

Factual Background

- 97 On October 23, 2011, Appellant was picked up by Pinal County Sheriff's Office and brought in for questioning by Detective Snyder. Officer Snyder recalled Miranda warnings were given in Spanish and English (R.T. 9-30-13 at 58). The appellant could speak some English (id at 54). Detective Snyder asked Sgt. Vargas, who was characterized by Officer Snyder as a native speaker of Spanish, to assist in the interrogation (ld at 67).
- ¶8 Officer Sanchez and Officer Vargas attended the interview with Officer Snyder (R.T. 9-30-13 at 66-67). Officer Synder reported that although the transcript of the interview said it was Officer Sanchez who

and a

translated, that it was really Officer Vargas:

- Q. So you understand your right and you want to answer the questions?
- A. No.
- Q. You don't want to answer questions, sir?
- Yes, I want to answer but okay, okay. Go ahead and say what it is you want to know.
 (R.T. 9-30-13 at 75 and Exhibit 116)
- ¶9 It was not disputed that Appellant speaks a little English, is illiterate in both Spanish and English and struggles with the English speaking (R.T. 9-30-13 at 76).
- ¶10 On September 14, 2012, defense counsel filed a motion to suppress statements challenging a general lack of voluntariness and inadequate unintelligible Spanish interrogation. On October 17, 2012, the State in its 9th Notice of Disclosure, provided a Spanish transcript of the interview.
- ¶11 A Pretral Suppression Hearing was conducted. Judge Johnson ruled that in this siituation, Appellant was detained for investigation at the police station. Judge Johnson noted the accused was in a holding cell at PCSO. The Judge felt the accused's English was pretty good and that he gave appropriate answers and denied the motion to suppress (Id at 77-83).
- ¶12 Deputy County Attorney Long submitted as an attachment to the motion of disclosure, a complete transcript of the police interview of

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Appellant in English transcribed by Courtreporter Gatewood (6-7-12).

Later, the prosecutor submitted another transcript of the same police interview with the addition of 22 pages of Spanish interpretation. A second page of transcript is placed next to the English page and purports to be a Spanish transcription and Spanish translation. This interpaginated transcript composes Exhibit 116. It is unknown who transcribed the Spanish. It is unknown who translated the Spanish in Exhibit 116.

¶13 On the English page of the interview, if a policeman speaks to Appellant it reads:

Detective Sanchez: in Spanish

Mr. Almanza: in Spanish

(R.T. Exh 116 at 15)

-OR-

Detective Snyder: . . . Do you understand each of these rights as I've just read them to you? (in Spanish discussion).

Detective Sanchez: I just read him his Miranda in Spanish and he stated he understood.

Detective Snyder: Okay knowing that, do you want to answer my questions?

Mr. Almanza: (indiscernable)

Detective Sanchez: He's stating that ---

Mr. Almanza: (indiscernable)

Detective Snyder: I - what - I'm sorry, what was your question?

Mr. Almanza: Why – why you say I (indiscernable)? I don't do nothing.

Detective Snyder: We're not saying that you need a lawyer. We're saying you have the right to have one if you want one./ We're not saying that you have to have one. We're just saying that if you want...

Mr. Almanza: Well, I aint got money

Detective Snyder: Okay. Well, and if you can't afford one, then the Court can appoint one at a – at a later time

(R.T. Exh. 116 at 18-19)

¶14 Judge Johnson determined there was no arrest, merely investigation. Judge Johnson ruled Miranda warnings were properly given (R.T. 9-30-13 at 80-83). Judge Johnson determined Appellant waived his Miranda rights and wanted to talk to police. The judge decided Appellant's English was good enough (Id).

Issue

¶15 Was Appellant in custody? Was Appellant properly advised of Miranda rights? Did Appellant knowingly, intelligently and voluntarily waive his rights?

Argument

- ¶16 There are numerous deficiencies present which render the accused's statements involuntary and inadmissible:
 - 1. The appellant was in police custody;
 - 2. Miranda warnings given inaccurately;
 - 3. The Spanish interpreter was unqualified;
 - 4. Statements Involuntary.

A. <u>Custody</u>

- ¶17 A person is in police custody if from the totality of circumstances a reasonable person would conclude his freedom of movement was restrained. Stansbury v California, 511 U.S. 318 (1994); U.S. v Crawford, 372 F.3d 1048 (9th Cir. 2004); U.S. v Kim, 292 F.3d 969 (9th Cir. 2002).
- ¶18 When these criteria are utilized, it is clear Appellant was not merely a person of interest, potential witness, etc., but rather in custody.
- ¶19 The appellant was in custody at the time of the police interview. He was cuffed and transported by police to Pinal County Sheriff's Office detention facility. He was confronted with Ada's accusations. He was not free to leave. He was not told he was free to leave. (R.T. 9-30-14 at 59-62).

B. <u>Inaccurate Miranda Warnings</u>

Miranda is violated when a suspect is in custody and interrogated without receiving his Miranda warnings or without knowingly, intelligently and voluntarily waiving the rights described in those warnings. Dickerson v U.S., 530 U.S. 428, 435 (2000), quoting Miranda, 384 U.S. 436, 86, S.Ct. 1602, 16 L.Ed.2d 694 (1966); Florida v Powell, 559 U.S. 50, 130 S.Ct. 175 L.Ed.2d 1009 (2010).

¶21 The Miranda warnings includes:

You have the right to remain silent. Anything you say can and will be used against you in a Court of law. You have the right to have an attorney assist you. If you cannot afford an attorney, an attorney will be appointed to assist you free of cost. Do you understand these rights? Do you wish to give up these rights and speak to us?

¶22 If a suspect makes a statement during custodial interrogation, the burden is on the State to prove as a prerequisite to admissibility that the defendant knowingly, intelligently and voluntarily waived his Fifth and Sixth Amendment rights.

¶23 The police incorrectly advised Appellant as to his Fifth and Sixth

Amendment rights.

¶24 First, it appears the police never told Almanza an attorney would be free. Second, the police never told him the attorney would be present now or during questioning as opposed to off in the future sometime. When Appellant responded about the attorney, he was misinformed the Court could appoint an attorney later (Id at 18-19 supra).

The State bears the never shifting burden of proof to establish that statements of a detained arrestee were freely and voluntarily made. This requires someone such as police to advise an accused of the standard Miranda warnings or establish the person had knowledge of Miranda rights from another source.

Mhen the State created the first transcript of the police interview of Appellant, anything spoken in Spanish was omitted. The State did not obtain a translation of Spanish to English until later. When one examines the interlineated Spanish translation of the interview, the same errors and omissions of Miranda warnings are found.

C. Unqualified Interpreter

¶27 Firstly, although Detective Sanchez stated Appellant understood his Miranda warnings that does not appear true (Id at 18-19). The appellant

and some

place in the case sub judice.

¶31 The police should not interpret because they are not neutral. Police have a particular bias as to the outcome. Police have not been tested for language proficiency. Police are not trained to retain and record all key words and phrases in a lengthy question or lengthy response. The higher the risk or impact the greater the importance of high standards of competency

D. Statements Involuntary

¶32 Defendant's colloquy was:

- Q. So you understand your right and you want to answer questions?
- A. No
- Q. You don't want to answer questions, Sir?
- A. Yes, I want to answer but... Okay, okay, go ahead and say what it is you want to know.

(R.T. 9-30-13 at 75 and Exh. 116)

¶33 "No" is as simple and clear as an illiterate Spanish speaker can get.

"No" is not ambiguous. "No" should have ended the interrogation.

¶34 In this matter, the detectives did not honor Almanza's invocation of right to remain silent.

¶35 Under Miranda, a person in custody must be advised of his right to

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was definitely confused in two languages.

¶28 Neither Officer Vargas nor Officer Sanchez was never qualified as a person capable of doing a Spanish translation of legal terms or everyday words:

Detective Snyder: Okay, I'll tell you what. Hang on a minute. Let me see if we can get the sergeant over here that speaks a little bit of Spanish. Maybe he can help out. Okay?

Mr. Almanza: (indiscernable)

(Exh. 116 at 5)

¶29 It is impossible for anyone to evaluate Officer Vargas / Sanchez's proficiency. It requires a much higher level fo skill to have a good command of legal terminology in Spanish. To merely assume that anyone with a Mexican last name can interpret is bigotry.

¶30 In a legal context, professional language assistance means accuracy is paramount along with a duty to remain impartial. Bilingual police staff without prior training should not be expected to function as interpreters. To interpret in a criminal law setting, the interpreter must know words, terms and jargon of police procedure, legal system, street slang and idioms. There is a difference between an officer in an emergency endeavoring to communicate in Spanish and a formal scheduled interview such as took

remain silent and right to free legal assistance. Miranda v Ariz., 384 U.S. 436 (1966). Thereafter, if the person indicates in any manner prior or during questioning that he wishes to remain silent, the interrogation must cease (Id at 384 U.S. 473-474). No specific language is required as long as it is clear enough for a reasonable person to understand. St. v Stayhand, 184 Ariz. 571, 911 P.2d 577 (App. 1995).

¶36 It is important to note that inquiries between an accused and state agents regarding routine incidents in a custodial relationship will not be deemed to initiate a conversation in the sense of Edwards v Ariz., 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); St. v Kemp, 185 Ariz. 52, 912 P.2d 1281 (1996).

¶37 Almanza did respond to the detective's provocative lying statements that there was DNA evidence against him. These were statements calculated to persuade Almanza to change his mind about ending the interrogation. St. v Hicks, 133 Ariz. 64, 649 P.2d 267 (1982).

¶38 This evidence affected the verdict in this case. These incriminating statements lent considerable strength to the recollections of a 4-year-old victim. A confession is the most probative and damaging of evidence and may attempt a jury to rely on that alone in reaching a decision. Arizona v

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<u>Fulminante</u>, 499 U.S. 279 (1991). Even though the state may assert there was other significant evidence, it cannot be said Almanza's incriminating statements, "had no influence" on the jury. <u>St. v Bible</u>, 175 Ariz. 549, 858 P.2d 1152 (1993).

¶39 In conclusion, Appellant submits police did not scrupulously honor his right to silence or right to counsel. Appellant submits the Honorable Johnson erred as to the underlying facts and conclusions of voluntariness which are unsupported by law. <u>St. v Hensley</u>, 137 Ariz. 80, 669 P.2d 598 (1983).

WAS IT FUNDAMENTAL ERROR TO ADMIT RULE 404(b) PRIOR BAD ACTS EVIDENCE?

Standard of Review

¶40 The appellate court reviews the admission of uncharged sex acts for abuse of discretion. <u>St. v Aguilar</u>, 209 Ariz. 40, 97 P.3d 865 (2004).

Factual Background

¶41 There was no pretrial Rule 404(b) motion in limine by the State regarding bad acts evidence of the accused. There was no oral motion regarding bad acts evidence of the appellant.

¶42 Defense counsel inquired of Ada's mother:

- Q. Do you ever remember punching Fernando in the face?
- A. Yes, I do.
- Q. Can you tell me about that?
- A. He behaved inappropriate with me and I turned around instinctively and I punched him.

(R.T. 10-01-13 at 171)

¶43 On redirect, the prosecutor followed up about what led to the punch.

The mother, Ms. Q., testified Appellant pressed up against her while they

were at work and she punched him, (Id at 176). Mother testified on another day at work, she was grabbed and groped by Appellant. Mother screamed (Id at 177). One time, early in the morning, he just came inside her house at the ranch. Mother said, "Why are you in my house and he said he wanted to come wake me up" (Id at 178). Mother said Appellant was also a peeping Tom (Id at 178).

¶44 Defense counsel did not object to the prior bad acts evidence.

<u>Issue</u>

¶45 Was it error to allow bad acts evidence without disclosure or a 404(b) hearing? Was evidence of other bad sex acts involving Mother unduly prejudicial and plain error?

<u>Argument</u>

¶46 Theoretically, the prior bad acts evidence could have been utilized by the State under two exceptions. The first is Rule 404(b) to show common scheme, plan, ID, etc. The second is Rule 404(c) sexual propensity. ¶47 In a nutshell, the question is whether prior bad acts of groping or being a Peeping Tom of an adult woman (Mrs. Q) was relevant under any theory at all as to a molestation of a 4-year-old girl.

A. Rule 404(b)

¶48 Rule 404(b), Other Crimes, Wrongs and Acts states:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however be admissible for other purposes, such as . . . intent . . . plan, knowledge or absence of mistake . . .

¶49 There is a four-part test for admissibility of a prior bad act. <u>U.S. v Vo</u>, 413 F.3rd 1010 (9th Cir. 2005); <u>U.S. v Merhmanesh</u>, 689 F.2d 822 (9th Cir. 1982); <u>U.S. v Vizcarra-Martinez</u>, 66 F.3rd 1006 (9th Cir. 1995)

- 1. Proximity in time
- Data sufficient to conclude accused did commit the former criminal misconduct
- Intent and knowledge in former case similar to intent and knowledge charged offense
- 4. Probative value outweighs prejudice

¶50 If the bad acts evidence was utilized for a nonpropensity purpose such as motive, intent, identity, etc., as long as the Court determines probative value outweighs potential prejudice and the bad acts are relevant, an appropriate cautionary instruction must be given.

In the matter at bar, the State did not provide notice of prior bad acts as required by Rule 15.1. The State failed to advise the Court of likely use of prior bad acts n order to obtain a ruling on relevancy of the prior bad act. There was no judicial weighing of the probative value of the prior bad acts. There was no limiting instruction.

B. Rule 404(c)

¶52 Rule 404(c) allows propensity evidence in a case of sexual misconduct. Evidence of bad acts must be screened prior to admissibility as propensity evidence. St. v Ferrero, 229 Ariz, 239, 274 P.3d 509 (2012). The trial court must determine specifically:

- 1. The accused committed the bad acts;
- The bad acts provided a reasonable inference of a sexual propensity;
- 3. Probative value outweighed prejudice;
- The jury was instructed on the proper use of evidence.
 St. v Aguilar, 209 Ariz. 340, 97 P.3d 865 (2004).
- ¶53 The Arizona appellate courts have struggled with the admissibility of sexual propensity evidence for a long time. In <u>St. v McFarlin</u>, 110 Ariz. 225, 517 P.2d 87 (Ariz. 1973), the Arizona Supreme Court recognized in

addition to the usual 404(b) exceptions, an exception of emotional propensity for sexual aberration. The court limited this type of evidence to cases involving abnormal sex acts if the bad acts were similar in nature to the charged crime and close in time. In McFarlin, there was heterosexual sex misconduct and consent was the defense. There, the Court determined the emotional propensity exception did not apply (The Arizona Supreme Court relied on Lovely v U.S., 169 F.2d 386 (4th Cir. 1948).

¶54 In St. v Treadway, 116 Ariz. 163, 568 P.2d 1061 1977), the Arizona Supreme Court held if the bad acts are dissimilar or remote then it is necessary an expert provide evidence of relevance of those dissimilar or remote bad acts. Subsequently, Rule 404(c) was adopted which abolished

¶55 In St. v Aguilar, 209 Ariz. 340, 97 P.3d 865 (2004), the Arizona Supreme Court held under the plain language of Rule 404(c) the types of sex offenses for which other bad acts evidence may be admitted are no longer restricted to those listed in McFarlin. Now, the question is whether other bad acts evidence leads to a reasonable inference the defendant had a character trait which gives rise to a aberrant sexual propensity to commit the charged sexual offense. The prior bad acts themselves need not be

the expert testimony requirement.

aberrant or abnormal as long as those bad acts lead to the conclusion the defendant has an aberrant propensity to commit a certain sex offense.

There must be evidence upon which the trial court could make that finding.

The Arizona Supreme Court has clarified as long as other requirements that sex propensity evidence may be allowed.

C. Not Harmless Error

¶56 If the Court determines it was error for the Honorable Johnson to admit the prior bad acts, Appellant also urges this error cannot be characterized as mere harmless error.

¶57 A non-constitutional error is harmless unless it had a substantial influence on the jury verdict or leaves a reasonable person in grave doubt as to the impact of the error. U.S. v Rivera, 900 F.2d 1412 (10th Cir. 1990). ¶58 Harmless error is the admission of evidence which beyond a reasonable doubt did not contribute to the verdict. Chapman v California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); St. v Garcia, 200 Ariz. 471, 28 P.3d 327 (2002). Error could be harmless if there was substantial evidence in the record fulfilling the admissibility requirements. St. v Vega, 228 Ariz. 24, 262 P.3d 629 (2011). In the case *sub judice*, the record is devoid of data which could have satisfied Rule 404(c) requirements. There